IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC. APPLICATION No 8214 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

RITABEN ASHOKBHAI SHAH

Versus

SANJAY KANUBHAI SHETH,DIRECTOR ANALS SHARE & STOCK PVT.LTD.

Appearance:

1. Criminal Misc.Application No. 8214 of 2002

MR FB BRAHMBHATT for Petitioner No. 1

MR MJ BUDDHBHATTI for Respondent No. 1

MR ND GOHIL APP for Respondent No. 2

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 29/04/2003

C.A.V. JUDGEMENT

1. This application under section 482 of the Code of Criminal Procedure is filed with a prayer to quash the complaint filed by the original complainant, who is the respondent No.1 herein. The complaint was registered as Criminal Case No.875 of 2001 in the Court of the learned Metropolitan Magistrate, Court No.15, Ahmedabad and, after recording of statement on oath, order dated 9.5.2001 was made to register the complaint under section 138 of the Negotiable Instruments Act, 1881 ('the Act' for short) and to issue summons to the original accused Nos.1 and 2, who are alleged to be related as the husband and wife. This application is filed only by the accused No.1, who is the wife. It is alleged in the complaint that the accused persons had dealings of shares with the complainant and, towards the amounts due from them, a cheque of Rs.6,62,868.06 ps. was issued by the accused No.2 and the same had been returned with the remarks "payment stopped by the drawer". Then, after the statutory notice and its reply, the complaint for the offence under section 138 of the Act was filed.

2. The case of the petitioner was argued mainly on the basis of the fact that the cheque in question was neither issued nor signed by the petitioner, nor was the account on which it was written was maintained by the petitioner. It was, therefore, submitted that the essential ingredients to constitute the offence under section 138 of the Act were not, as far as the petitioner was concerned, disclosed in the complaint even if the allegations therein were taken at their face value. It is not in dispute that the account on which the cheque in question was issued was in the name of the accused No.2 and his daughter, but the complainant sought to substantiate the allegation of complicity and joint liability of the petitioner on the basis of the allegation that the transactions of shares from which the liability arose were entered into with the petitioner. Thus, an attempt was made on behalf of the complainant to mix the joint account of the share business with the joint liability for the dishonour of the cheque. The legal question posed in the facts of the case is as to whether joint liability of a person for the debt would necessarily make that person also liable to be prosecuted for the dishonour of cheque issued towards payment of the debt. Having regard to the scheme and relevant provisions of the Act, the simple and easy answer would be in the negative.

3. It was, however, contended by Mr.Buddhbhatti, learned advocate for the complainant, that in the extended ambit of the word "company", even firms or any

other association of persons was included by virtue of the provisions of section 141 and where the cheque was drawn by such a 'person', every person who, at the time the offence was committed, was in charge of and was responsible to such association of individuals for the conduct of its business, is deemed to be guilty and is liable to be proceeded against and punished accordingly. Relying upon the judgment of the Supreme Court in ANIL HADA v. INDIAN ACRYLIC LTD. [(2000) 1 SCC 1], it was submitted that the effect of section 141 was that when company was the drawer of the cheque, such company was principal offender under section 138 of the Act and the remaining persons were made offenders by virtue of the legal fiction created by the legislature as per this section. Relying upon the judgment of the Supreme Court in S.A.NANJUNDESWARA v. M.S. VARLAK AGROTECH PVT. LTD. [AIR 2002 SC 477], it was also submitted that the High Court can be justified in quashing the proceedings only if it comes to the conclusion that even the statements taken at their face value do not make out any offence. It was, on that basis, submitted that the parties should be left to prove their case in the trial court and this was not a fit case in which the exceptional remedy of quashing could be availed.

4. The learned counsel for the petitioner relied upon the use of the word "drawer" in section 138 and insisted that it is only the drawer of the cheque who could be prosecuted. As for the effect of the provisions of section 141, the petitioner relied upon the judgment of the Andhra Pradesh High Court in K.SEETHARAM REDDY v. SMT. K.RADHIKA RANI AND SMT. CH. KASTURI [2002 Company Cases 204], according to which the expression "other association of individuals" should be construed ejusdem generis along with other expressions "company" or "firm" in the context in which they have come to be incorporated in clause (a) of the Explanation under section 141. It was also held in the facts of that case that the petitioner was obviously not a drawer of the cheque and the other accused had drawn the cheque in the capacity of proprietor of the firm on the account maintained in regard thereto and hence, there was no association of individuals. It is also held by the Madras High Court in GUMMADI INDUSTRIES LTD. v. KHUSHROO F. ENGINEER [2000 (1) Crimes 1] that though the liability or debt was legally enforceable against the first accused company, the cheque had been issued by the second accused in his individual capacity, and as such he alone was the drawer and hence the proceedings as against the petitioner, who was not the drawer, were liable to be quashed. In another judgment of the Andhra Pradesh High Court in

KALYANI REFINERIES LTD. v. BANARAS STATE BANK LTD. [2000 (1) Crimes 390], it is observed that the conception of civil liability cannot be imported into the question of criminal liability which has to be gathered from the specific statutory provisions in that behalf. According to the very specific requirement mandated in section 138 of the Act for constituting an offence under it, the cheque should have been drawn by the drawer having legally enforceable liability in favour of the payee with the further requirement that the cheque should have been drawn on an account maintained by the drawer.

5. The crucial question which, therefore, arises in this case is whether the husband and the wife, the co-accused, can be treated as "an association of individuals" as envisaged in the Explanation below section 141 of the Act. This issue cannot be examined as a pure question of law. But it has to be examined in the context of the facts of the case and the averments made in the complaint. The complaint nowhere even alleges that the co-accused persons, i.e. the husband and the wife, were an "association" within the meaning of section 141 of the Act or otherwise. Secondly, the alleged history of the wife maintaining an account with the complainant in respect of her transactions of shares, jointly with her husband, may be indicative of a debt or other liability of the wife towards the complainant. And, the cheque may be for the discharge of such liability of the wife which would make the issuance of cheque a payment in consideration of the debt. In other words, the cheque could be towards a legally enforceable debt or liability since a cheque can be drawn by one person towards a legally enforceable debt or liability of another person and it is not necessary under section 138 of the Act that the cheque must have been drawn by the person for his own debt or liability. In short, even if, prima facie, issuance of a cheque were not taken to be without consideration, to extend the criminal liability to the person in discharge of whose debt or liability the cheque was issued, it first requires the linkage of an association. Mere issuance of a cheque by one person in discharge of liability of another person cannot make an association. Therefore, even if the expression "other association of individuals" as it occurs in section 141 of the Act is loosely interpreted to be not necessarily a juristic person, like a company or a firm, there must be an indication of existence of an association among the individuals. The reading of section 141 as a whole also indicates that in case of the person committing an offence under section 138 being a company, the company as well as the persons in charge of and responsible to the

company at the time of commission of the offence are to be deemed to be guilty and would be liable to be proceeded against. Thus, when a cheque is drawn by or on behalf of a company, the natural persons connected with the commission of the offence are sought to be caught into the net of criminal liability. It is also clear that the provision envisages the status and existence of a 'company', the word to be interpreted in its extended sweep, as a separate and distinct juristic person attracting criminal liability and hence, as aforesaid, the natural person and the juristic person cannot be the same and yet attract a criminal liability as a juristic person as well as a natural person.

5.1 The other argument that it is only the drawer, who failed to make payment within 15 days of the receipt of notice, who can be prosecuted, however, is devoid of merit since who is deemed to have committed an offence under section 138 of the Act is a "person" and the word "person" is given, by virtue of section 141 of the Act, an expanded meaning for the purpose of prosecution.

6. As seen earlier, in the facts of the present case, the allegations and averments are only to the effect that the wife had been doing the business along with her husband and the cheque was issued in discharge of her liability although the cheque was neither issued or signed by her nor was the account maintained by her or by a person who could be said to be an "association of individuals". Instead, the account was maintained by human beings and natural persons who happen to be her husband and daughter. Therefore, in the facts of this case, the petitioner could not have been implicated in a criminal prosecution launched exclusively alleging an offence under section 138 of the Act. It has, however, to be deprecated that, in the present petition, by mingling other averments, an attempt and prayer is made to quash the criminal case as a whole so as to really benefit the husband in whose favour none of the grounds for quashing were made out.

7. In the result, the petition is partly allowed and the Criminal Case No.875 of 2001, as far as it relates to the petitioner, i.e. the original accused No.1, is hereby quashed. Rule is made absolute accordingly with no order as to costs.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)